IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA186/2019
[2019] NZCA 364

BETWEEN	PAUL NEVILLE BUBLITZ Appellant
AND	THE QUEEN Respondent

CA149/2019

BETWEEN	BRUCE ALEXANDER MCKAY Appellant
AND	THE QUEEN Respondent

CA187/2019

BETWEEN	RICHARD TIMOTHY BLACKWOOD Appellant
AND	THE QUEEN Respondent

Hearing:	4 July 2019
Court:	Gilbert, Wylie and Thomas JJ
Counsel:	R S Reed QC for Bublitz G N E Bradford and S D Withers for McKay M A Corlett QC and H M Z Ford for Blackwood D G Johnstone and S A Rankin for Respondent
Judgment:	16 August 2019 at 9 am

JUDGMENT OF THE COURT

A Mr Bublitz's appeal against conviction is allowed in part. The convictions on charges 14 and 15 are set aside. We direct that a judgment of acquittal be entered on those charges. Mr Bublitz's appeal against conviction on charges 10–13 is dismissed.

B Mr Bublitz's appeal against sentence is allowed. His sentence of three years and two months' imprisonment is set aside and a sentence of 11 months' home detention is substituted on each of charges 10–13 to be served concurrently. This sentence is to commence immediately upon release. Following his release, Mr Bublitz is to travel directly to the address stated in the memorandum dated 9 July 2019 from the Department of Corrections and await the arrival of a security officer. Mr Bubltiz is to comply with the special conditions set out in that memorandum.

C Mr McKay's appeal against conviction is dismissed.

D Mr Blackwood's appeal against conviction is allowed. The convictions on charges 10–13 are set aside. We direct that a judgment of acquittal be entered on those charges.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] Following a Judge-alone trial in the High Court at Auckland before Toogood J, Mr Bublitz was convicted of four charges of theft by a person in a special relationship, an offence under s 220 of the Crimes Act 1961 (charges 10–13).[1] These charges alleged Mr Bublitz knowingly misapplied funds raised from the public by Mutual Finance Ltd (Mutual), a company Mr Bublitz controlled, in breach of the restrictions on related party transactions contained in a deed of guarantee dated 8 December 2009 between Mutual and the Crown (Mutual Crown guarantee).[2]

[2] Charges 10–12 concerned the purchase by Mutual from a company associated with Mr Bublitz, Viaduct Capital Ltd (Viaduct), of loans Viaduct had made to companies in the Hunter group through which Mr Bublitz undertook various property development projects. The Judge was satisfied these loan purchases were related party transactions because he found Mr Bublitz controlled both Mutual and Viaduct for the purposes of the Mutual Crown guarantee at the relevant times.[3] The Judge found that the restrictions on related party transactions in the Mutual Crown guarantee were knowingly breached in respect of these transactions.[4]

[3] Charge 13 arose out of advances made by Mutual to Hilltop Ridge Farms Ltd (Hilltop), one of the Hunter group companies. The Judge was satisfied Mr Bublitz controlled both Mutual and Hilltop at the time these advances were made and these also breached the related party restrictions in the Mutual Crown guarantee.[5]

[4] Messrs McKay and Blackwood were convicted as parties to these offences (save that Mr McKay did not face charge 13).

[5] Mr Bublitz was also convicted of two charges of making a false statement as a promoter in a prospectus, an offence under s 242 of the Crimes Act (charges 14

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1 *R v Bublitz* [2019] NZHC 222 [Verdicts judgment].

2 The Crown Retail Deposit Guarantee Scheme was established in October 2008 under the Public Finance Act 1989 to shore up the New Zealand banking system and give assurance to New Zealand depositors. Under the Scheme, the Crown guaranteed to repay depositors if the financial institutions in which they invested subsequently failed.

3 Verdicts judgment, above n 1, at [229]–[265].

4 At [281]–[291].

5 At [269]–[271].

and 15). Mutual's prospectuses issued in March and April 2010 referred to the benefit of the Crown guarantee but did not disclose the risk it could be withdrawn at short notice because of the alleged breaches founding charges 10–13.

[6] Mr Bublitz was acquitted on six other charges alleging related party transactions between Viaduct and companies controlled by Mr Bublitz which transactions were alleged to be contrary to the terms of Viaduct's Debt Security Trust Deed (Viaduct Trust Deed) (charges 1–3 and 5–7). The Judge was not satisfied these were related party transactions because the Crown had not proved that Mr Bublitz "controlled" Viaduct in terms of the Viaduct Trust Deed.[6] It followed from this conclusion that Mr McKay and Mr Blackwood had to be acquitted on the other charges they faced. These were: charge 4 (Mr McKay), which alleged statements in Viaduct's prospectus were false because of the related party lending giving rise to charges 1–3; charge 8 (Mr McKay and Mr Blackwood), which alleged statements in Viaduct's later prospectus were also false because of related party lending giving rise to charges 1–3 and 5–7; and charge 9 (Mr McKay and Mr Blackwood), which alleged false statements in the directors' quarterly report to the trustee by reason of the alleged related party transactions founding charges 1–3 and 5–7.[7]

[7] As we discuss in more detail later, this was the second trial for this matter. An earlier trial, which commenced on 8 August 2016, was aborted on 10 May 2017 after nine months of hearing. At the commencement of the first trial, the Crown charge notice listed 49 charges. These included 11 charges alleging breaches of the related party lending restrictions in a separate trust deed dated 14 August 2002 Mutual had in place to protect its investors (Mutual Trust Deed), including the transactions supporting charges 10–13. Having considered the expert evidence proposed to be called by the defence, the Crown elected not to offer evidence on these charges and they were dismissed on 21 September 2016.[8]

[8] As will be apparent, the essence of the Crown case from the outset was that the appellants engaged in related party transactions on behalf of Viaduct and Mutual

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6 At [178]–[218] and [220].
7 At [218].
8 *R v Bublitz* [2016] NZHC 2863 [First stay judgment] at [4]; and *R v Bublitz* [2017] NZHC 2251 [Third stay judgment] at [16].

knowing this was in breach of their obligations pursuant to the Viaduct Trust Deed, the Mutual Trust Deed or the Mutual Crown guarantee (as applicable). The appellants were never charged with breaching the Viaduct Crown guarantee. The appellants were acquitted on the charges based on a breach of the restrictions on related party transactions in the Viaduct Trust Deed. The charges alleging breach of the restrictions on related party transactions in the Mutual Trust Deed were dismissed. However, the appellants were convicted on the charges arising out of the same transactions but alleging a breach of the restrictions on related party transactions in the Mutual Crown guarantee. Even then, the Crown succeeded on only one of the two definitions of "control" relied on under the Mutual Crown guarantee.

[9] In summary:

(a) the Judge was satisfied Mr Bublitz controlled Viaduct in terms of one of the definitions in the Mutual Crown guarantee at the time of the transactions giving rise to charges 10–12;

(b) the Judge was not satisfied Mr Bublitz controlled Viaduct in terms of the alternative definition in the Mutual Crown guarantee relied on by the Crown for those same charges;

(c) the Crown elected not to offer evidence that Mr Bublitz controlled Viaduct in terms of the Mutual Trust Deed at the time of those same transactions and those charges were dismissed;

(d) the Judge was not satisfied Mr Bublitz controlled Viaduct in terms of the Viaduct Trust Deed at any relevant time; and

(e) Mr Bublitz was not charged that he controlled Viaduct in terms of the Viaduct Crown guarantee.

[10] These outcomes are explicable only on the basis that the definition of "control" in the Mutual Crown guarantee was wider than the comparable provisions in the Viaduct Trust Deed and the Mutual Trust Deed. Whether the appellants

understood the breadth of the restrictions on related party lending in the Mutual Crown guarantee arising out of the extended definition of "control", and whether they participated in the transactions knowing they breached those restrictions, are issues lying at the heart of these appeals against their convictions. Mr Bublitz also appeals against his sentence of three years and two months' imprisonment contending this was manifestly excessive in all the circumstances.[9]

Background

[11] We briefly set out the background to the alleged offending before addressing the specific grounds of appeal.

[12] The 2008 global financial crisis (GFC) had a major impact on commercial property developments in New Zealand leading to illiquidity, distressed loans and depressed asset values. Nicolaas Wevers, who had over 30 years' experience in commercial property management and investment, identified an opportunity to take advantage of these market conditions by establishing a well-capitalised specialist finance company to acquire distressed property loans at greatly discounted prices, funding the completion of the developments and making significant profits. In late 2008 Mr Wevers invited Mr Bublitz to join him in the venture and help fund it.

Hunter group

[13] Mr Bublitz had built a sizable property development business through various companies known as the Hunter group (Hunter). Hunter had significant assets but, like many other such companies at this time, cashflow was becoming a serious concern. Mr Bublitz was attracted to the possibility of acquiring a finance company that had the benefit of a Crown guarantee as a source of funding for Hunter and to take advantage of the other investment opportunities Mr Wevers had identified. Mr Bublitz and Mr Wevers recognised that any such finance company would be subject to restrictions on related party lending both under its debt security trust deed and any Crown guarantee and the implications of this would need to be managed carefully. They asked Mr McKay, who had been engaged under contract to Hunter in a senior

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9 *R v Bublitz* [2019] NZHC 592 [Sentencing judgment].

finance role since August 2005, to consider and report on the various tests for determining whether parties were "related" and the implications of this in structuring the proposed purchase. They also obtained professional advice from reputable accountants and lawyers on how this problem could be managed.

Viaduct Capital Ltd

[14] Priority Finance Ltd (Priority) was subsequently acquired by a company formed for that purpose, Phoenix Finance Holdings Ltd (Phoenix). It was originally intended that Mr Bublitz would hold 600 of the 900 shares in Phoenix with Mr Wevers holding the balance. However, due to a change in the accountant's advice two days before settlement that this shareholding would create related party problems, the transaction was restructured so that Mr Wevers acquired all the shares in Phoenix giving him control of Priority. Hunter funded the purchase through a loan agreement with Phoenix secured by a general security agreement over Phoenix's assets which comprised its shares in Priority. Following settlement of the purchase in February 2009, Priority changed its name to Viaduct Capital Ltd and Mr Wevers and Mr McKay were appointed its directors. Mr McKay became Viaduct's chief financial officer.

[15] Cash available to Viaduct was used to purchase various assets from Hunter and make cash advances to it thereby alleviating Hunter's cashflow difficulties. However, following an investigation and report by PricewaterhouseCoopers (PwC), the Treasury withdrew Viaduct's Crown guarantee in April 2009. This was because Treasury considered the guarantee was being used to provide benefits to persons outside the intended scope of the scheme. It was not suggested at that time that Viaduct and the Hunter entities with which it transacted were related parties. PwC appeared to accept they were not.

[16] Without the Crown guarantee, Viaduct had difficulty raising further funds from the public and its cash position deteriorated to the point where Mr Wevers advised Mr Bublitz in September 2009 that he would not allow Viaduct to provide further funding to Hunter and he could not sign a prospectus seeking further funds from the public. Mr Wevers urged Mr Bublitz to take "drastic actions immediately"

including selling his house and other assets to address funding issues. Mr Wevers' concerns were not resolved to his satisfaction and he resigned as a director of Viaduct later that month. He transferred 51 per cent of his shareholding in Phoenix to Mr McKay but retained the balance of the shares. Mr Blackwood, who had been engaged on contract as a loan originator for Viaduct in early March 2009, replaced Mr Wevers as a director.

Mutual Finance Ltd

[17] In December 2009 Argus Capital Ltd, a Hunter group company, purchased Mutual. Mutual was another finance company with the benefit of a Crown guarantee. It is not disputed that Mr Bublitz controlled Mutual for the purposes of the related party transaction restrictions in the Mutual Crown guarantee; Mr Bublitz was Mutual's managing director and the ultimate owner of its shares.[10]

[18] Following acquisition, Mutual entered into the transactions giving rise to charges 10–13.

The charges

Charges 10–12

[19] Charges 10–12 are in materially the same terms and all allege related party transactions between Mutual and Viaduct in breach of the terms of the Mutual Crown guarantee. It will therefore suffice to set out the wording of charge 10 by way of example:

> [The appellants], between 25 January 2010 and 11 February 2010, at Auckland or elsewhere in New Zealand, together with PETER LOUIS CHEVIN,[11] had control over property, namely investor funds in Mutual, on terms or in circumstances that they knew required them to deal with the property in accordance with the requirements of the Crown under the replacement Crown Guarantee dated 8 December 2009 (**replacement Crown Guarantee**), and intentionally dealt with the property otherwise than in accordance with those requirements.

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10 Verdicts judgment, above n 1, at [31].

11 Mr Chevin was a close business associate of Mr Bublitz who managed various projects for him.

Particulars

The purchase (in two tranches) by Mutual from Viaduct of the **Homebush loan** without the prior written consent of the Crown, such purchase involving a transaction (or series of linked or related transactions):

- having a value exceeding one percent of Mutual's Total Tangible Assets;

- to which a Related Party of Mutual (other than a wholly-owned subsidiary of Mutual) was a party (in that in terms of 1.2(f)(i) or (ii) of the replacement Crown Guarantee Mr Bublitz controlled both Viaduct and Mutual, each company being a subsidiary of his for the purposes of GAAP[12] and/or Mr Bublitz being able to exercise real or effective control, directly or indirectly, over each company or over a material part of each company's business or affairs); and

- not first certified to the Crown in writing, by an independent expert approved by the Crown in writing, that the transaction was, in the opinion of the expert, on arms' length terms.

[Refer cl 6.2(b) of the replacement Crown Guarantee]

(Footnotes added).

[20] By way of explanation, the Homebush loan referred to in charge 10 was a loan by Viaduct to Homebush Trustees Ltd (Homebush), a Hunter group company which was undertaking a property development in Khandallah, Wellington.[13] Charge 11 concerned the purchase by Mutual from Viaduct of a loan associated with a commercial property development known as Northgate at Silverdale, north of Auckland also being undertaken by the Hunter group.[14] Charge 12 related to the purchase by Mutual from Viaduct of a loan it had made to Hilltop, which was a Hunter group company formed for the purpose of carrying out the conversion of an underperforming dairy farm at Kinloch, Lake Taupō into a goat farm.[15]

Charge 13

[21] Charge 13 is in the same terms as charges 10–12, the only material difference being that the transactions comprised loan advances by Mutual to Hilltop rather than the purchase from Viaduct of existing loans to Hilltop and other Hunter group parties.

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12 GAAP is an acronym for Generally Accepted Accounting Practice.
13 Verdicts judgment, above n 1, at [101].
14 At [103].
15 At [104].

The alleged related parties were Mutual and Hilltop, not Mutual and Viaduct as with the other charges.

Charges 14 and 15

[22] Charges 14 and 15 are also in materially the same terms. Charge 14 relevantly reads:

> [Mr Bublitz] between 2 March 2010 and 28 April 2010, at Auckland or elsewhere in New Zealand, in respect of Mutual, made or concurred in the making or publishing of a false statement, with intent to induce any person to subscribe to any security within the meaning of the Securities Act 1978.
>
> **Particulars**
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> **Mutual's 3 March 2010 prospectus**, which amounted to a false statement because:
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> A. The prospectus drew particular attention to Mutual having entered the initial Crown Guarantee and the replacement Crown Guarantee…
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> B. The prospectus referred … to a wide range of risks pertaining to Mutual, including the risk of the Crown Guarantee scheme expiring on 12 October 2010 without being extended or replaced.
>
> C. The prospectus failed to disclose:
>
> - any of the breaches of the initial Crown Guarantee and the replacement Crown Guarantee the subject of Charges 10 to 13; and/or
>
> - the consequent risks of the replacement Crown Guarantee being withdrawn at short notice, and of Mutual's business operations being disadvantageously affected.

Grounds of conviction appeals

[23] There is considerable overlap between the grounds raised by the appellants in in support of their conviction appeals on charges 10–13. It is therefore convenient to list the grounds covering all charges and address them separately to the extent they apply to each appellant:

(a) Mr Bublitz's right to be tried without undue delay assured under s 25 of the New Zealand Bill of Rights Act 1990 (BORA) was breached to such an extent that the prosecution ought to have been stayed.

(b) The restriction in the Mutual Crown guarantee was insufficiently specific to give rise to a "requirement" in terms of s 220 of the Crimes Act. This is said to be because the concept of "control" in the definition of "related party" is vague and uncertain. All appellants rely on this ground.

(c) The Crown did not prove the transactions were not conducted on arm's length terms. Mr Bublitz contends such proof was required to establish a breach of the related party restrictions in the Mutual Crown guarantee.

(d) The Judge failed to make the requisite finding that Mr Bublitz entered into the transactions knowing they were in breach of the related party restrictions in the Mutual Crown guarantee.

(e) The Crown failed to prove that each of the appellants knew of the requirements in the Mutual Crown guarantee and that Mr Bublitz intentionally entered into the transactions knowing they were in breach of those requirements (and Messrs McKay and Blackwood knowingly assisted him in doing so). All appellants place emphasis on this ground and contend the Judge's reasons for finding these elements proved were inadequate.

(f) The statement concerning the Crown guarantee in the prospectuses was not materially false because even if the Crown withdrew the guarantee at short notice, this would not affect its obligation to pay existing depositors the full amount owing to them including interest. This ground relates to charges 14 and 15 and affects only Mr Bublitz.

(g) The Judge did not make the requisite finding of intent for the purposes of charges 14 and 15, finding only that Mr Bublitz was reckless.

(h) Mr McKay's right to a fair trial was breached because the Judge declined his counsel's application for additional time, before making his closing submissions, to enable him to consider a question trail

prepared by the Judge after the Crown closing and amendments to the charges suggested by the Judge at that stage.

Should the prosecution have been stayed?

Background

[24] The following summary of the procedural background is largely drawn from the judgment of Lang J declining the appellants' stay application in September 2017.[16]

[25] The transactions giving rise to the charges occurred between January 2009 and June 2010. The charges were laid and the appellants arrested in March 2014. The trial in the High Court initially began on 8 August 2016 before Woolford J, six and a half years after the last of the impugned transactions occurred and two and a half years after the appellants were arrested. When the trial commenced, Mr Bublitz faced 49 charges. Mr McKay was charged as a party to 41 of these and Mr Blackwood as a party to 28.

[26] Although the trial was expected to be completed within 12 weeks, this proved to be inadequate. The first witness called by the Crown was Jason Weir, an investigating accountant from Deloitte. His main and supplementary briefs of evidence comprised some 550 pages and it took approximately three weeks to lead his evidence and another three weeks for cross-examination. Mr Weir also played video recorded interviews of the appellants and Mr Wevers conducted by the Financial Markets Authority (FMA), consuming a further two weeks. Because several witnesses had to be interposed to accommodate their other commitments and Mr Weir's unavailability, he did not complete giving his evidence until the end of the twelfth week of the trial, the time originally allocated for entire trial.

[27] By this stage, many of the charges had fallen away. On 21 September 2016 the Crown elected to offer no evidence on 12 charges having considered the expert evidence the appellants proposed to call. On 14 October 2016 the Judge discharged the appellants on 22 further charges.

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16 Third stay judgment, above n 8.

[28] Deficiencies in disclosure emerged while Mr Weir was giving his evidence. Mr Weir told the Court he would review all documents held by Deloitte to determine whether any were relevant to the case. As a result, the Crown disclosed 171 further documents to the appellants in October 2016.

[29] In late November 2016 the appellants applied for orders staying the charges contending that the trial had become unduly burdensome and oppressive because of its length. Woolford J declined these applications in the expectation the trial would conclude by 7 April 2017.[17] However, the Judge dismissed another 18 charges.[18]

[30] Woolford J heard a second application for stay on 2 February 2017. The appellants argued they were unfairly prejudiced by the unavailability of an intended Crown witness, Barry Jordan of Deloitte, and the Crown's proposal to call Denise Hodgkins of Deloitte instead. The Judge declined this application for reasons given on 9 February 2017.[19] The Judge considered any unfairness to the appellants could be mitigated by taking a liberal view of any application by the appellants to recall Crown witnesses so that propositions they intended to put to Mr Jordan could be canvassed with those witnesses.[20]

[31] The Crown closed its case on 27 February 2017. Mr Bublitz then opened his case and elected to call evidence. On 23 March 2017, while one of his experts was giving evidence, the Crown provided a list of 14,619 undisclosed documents held by Deloitte. This late disclosure was an admitted breach of the Criminal Disclosure Act 2008. The taking of evidence continued until 27 March 2017 but halted at that point because of disputes about disclosure.

[32] On 28 April 2017 the Crown provided a further list of approximately 19,000 documents from the files held by the FMA and the Crown solicitor. The Crown disclosed a further 5,506 documents to the appellants in tranches between March and May 2017. Ongoing disputes about disclosure issues remained unresolved by May 2017, nine months after the trial had commenced, and the parties anticipated it

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17 First stay judgment, above n 8.
18 At [55].
19 *R v Bublitz* [2017] NZHC 114 [Second stay judgment].
20 At [27].

would take another two months to resolve the disclosure issues. The Crown was solely responsible for this unacceptable and wholly unsatisfactory situation.

[33] This led to Woolford J's decision to abort the trial on 10 May 2017. In his reasons given on 19 May 2017 the Judge described the Crown's admitted breaches of their obligations under the Criminal Disclosure Act as "seemingly unprecedented in New Zealand".[21] The Judge considered this had "restricted the choices open to the defence in respect of the presentation of their case, both in manner and extent".[22] The Judge concluded that the trial had to be aborted because of the possibility of unfairness to the appellants and the danger of a miscarriage of justice if the trial was to proceed.[23]

[34] On 6 June 2017 the Crown advised that it intended to proceed to a new trial against the appellants. At that stage, Mr Bublitz faced 13 charges of the original 49, Mr McKay, 7 of the original 41 and Mr Blackwood, 6 of the original 28 but the Crown proposed to withdraw one charge against Mr Bublitz and add a further seven.

[35] The appellants applied again for a stay of the proceedings. This was heard by Lang J in September 2017. The Judge declined the application for reasons set out in his judgment delivered on 18 September 2017.[24] The Judge noted that the Crown's breach of its disclosure obligations was not committed deliberately or in bad faith.[25] There was no suggestion the FMA or the Crown had endeavoured to use the criminal justice process for improper purposes or to conduct them in a manner designed to be oppressive or burdensome to the appellants.[26] The Judge considered a fair trial remained possible.[27] Turning to the appellants' rights under BORA to be tried without undue delay, the Judge observed that other remedies would be more appropriate such as an award of compensation if acquitted or a reduction in sentence if not.[28] The Judge concluded by warning the Crown that it would find it difficult to resist a further

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21 *R v Bublitz* [2017] NZHC 1059 at [66].
22 At [106].
23 At [107].
24 Third stay judgment, above n 8.
25 At [63].
26 At [64].
27 At [65].
28 At [73].

application for stay if significant issues arose in the future and it did not advance its case within an acceptable timeframe.[29]

[36] The second trial commenced on 13 August 2018 and concluded on 5 September 2018. Unfortunately, there was a further delay before the verdicts were delivered. This did not happen until 5 February 2019 with the reasons following on 21 February 2019. Mr Bublitz was sentenced on 27 March 2019.

[37] It is not disputed that the extraordinary delays have had profound consequences for the appellants and their families, affecting their health, reputations and financial positions. The Judge allowed a discount of 30 per cent for this at sentencing.[30]

Submissions

[38] Ms Reed QC for Mr Bublitz submits that the proper approach is to consider the impact of the delays on him as the holder of the right to be tried without undue delay. She says Mr Bublitz was forced to adjust his case as the Crown's theory evolved and the particulars of the charges were modified during the first trial. If the Crown had taken a more focused approach, Mr Bublitz would have been able to make more effective use of his limited financial resources in funding his defence. She argues that the Crown's serious breach of its disclosure obligations undermined the criminal justice process in that it affected Mr Bublitz's ability to prepare effectively for both trials.

[39] Because the first trial had to be aborted after nine months of hearing time, Mr Bublitz was no longer able to fund his own defence for the second trial; that choice was taken away from him. Ms Reed submits this was plainly unfair, even though she acknowledges Mr Bublitz was ably represented by replacement counsel funded by legal aid. Toogood J recorded that Mr Bublitz had spent approximately $1 million in costs at the first trial of which he recovered only $10,000 following a costs award made by Woolford J.[31]

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29 At [74].
30 Sentencing judgment, above n 9, at [93].
31 At [90].

[40] Ms Reed submits that the delay in this case was avoidable, undue and reprehensible. The Crown must take sole responsibility for this. Ms Reed endorses the observations made by Toogood J when he summarised the significant toll the delay has had on the appellants:[32]

> The real cost that I consider should be factored in, however, is the debilitating effect of being on trial, in the public eye, and on matters going directly to your occupations and business opportunities, over what must have seemed an interminable nine months. I do not think the harmful psychological effect of such a long and intense criminal fraud trial should be underestimated. I do not need to explain publicly what information has been provided to me about the medical and emotional effects of the first trial and the continuing criminal prosecution on each of you. But I have given careful consideration to the material you have put before me and I intend to take it into account to the fullest extent I consider reasonable.

[41] In these exceptional circumstances, Ms Reed submits a stay is warranted.

Analysis

[42] The leading authority on the principles to be applied in considering an application for stay of a criminal proceeding where there is State misconduct is the Supreme Court's decision in *Wilson v R*.[33] The Court identified two categories of cases where a stay could be justified.[34] The first is where the misconduct will prejudice the fairness of a defendant's trial. The second is where the misconduct will undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed. The Court emphasised that the analysis is forward-looking, the focus being on the impact of the misconduct rather than on the misconduct itself. Because of the public interest in the prosecution of those suspected of criminal offending, a stay is regarded as an extreme step to be taken only in the clearest of cases.[35]

[43] Ms Reed responsibly did not directly challenge the correctness of Lang J's decision declining to grant a stay prior to the commencement of the second trial. We are sympathetic to the appellants given the extremely drawn out and tortuous process they have had to endure but we consider Lang J's reasons for declining to

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32 At [91].
33 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
34 At [40].
35 At [60] and [121].

grant a stay are unimpeachable. Ms Reed also responsibly acknowledges that a fair trial could (and did) take place despite the delay. The disclosure breaches were serious but inadvertent and did not involve an abuse of the Court's processes. We consider the issue of thrown away costs should be dealt with by an award of costs. As Lang J said, the other consequences of the delay are more appropriately dealt with by remedies other than stay, including by the discount he foreshadowed could be allowed at sentencing in the event convictions were entered.

[44] There was no material change of circumstance that could justify revisiting Lang J's decision in the High Court. While not determinative, we note that no further application for a stay was advanced before Toogood J. We are not persuaded that the extreme step of a stay could be justified. This ground of appeal, which was advanced only by Mr Bublitz, must fail.

Was the definition of "control" in the Mutual Crown guarantee sufficiently specific to found a "requirement" for the purposes of s 220 of the Crimes Act?

[45] Section 220 of the Crimes Act relevantly provides:

> **220 Theft by person in special relationship**
>
> (1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person—
>
> …
>
> (b) to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.
>
> (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.

[46] It is not disputed that Mr Bublitz had control over the property of Mutual at all relevant times. The introductory words in subs (1) were therefore satisfied. The "other person" for the purposes of subs (1)(b) is the Crown. The "requirements" relied on are those in the Mutual Crown guarantee, namely the restrictions on related party transactions. The definition of "related party" in the guarantee incorporates the definition of related party in s 157B of the Reserve Bank of New Zealand Act 1989

as if the Principal Debtor under the guarantee (Mutual) was a deposit taker. However, the definition is expanded in the guarantee to include:

> "any Person [Person A] who controls the Principal Debtor [Mutual] and any Person [Person B] who is controlled by any such Person [Person A]".
>
> (Interpolations added).

Under this definition, Persons A and B are both related parties of Mutual. The Crown case is that Viaduct fell within the definition as Person B. This is because Mr Bublitz [Person A] controlled Mutual, and Viaduct [Person B] was also controlled by Mr Bublitz [Person A]. The question of control of Viaduct for the purposes of the guarantee is accordingly pivotal. Absent such control, the transactions were not related party transactions to which the restrictions in the Mutual Crown guarantee applied and charges 10–12 would necessarily fail. Similarly, for the purposes of charge 13, the Crown had to prove Mr Bublitz controlled Mutual and Hilltop at the relevant time.

Definition of "control"

[47] The definition of "control" is set out in cl 1.2(f) of the Mutual Crown guarantee. Subclause (i) incorporates the definition of a subsidiary for the purposes of GAAP. The Judge found that Mr Bublitz did not control Viaduct in terms of this definition. The sole focus shifted to whether Mr Bublitz nevertheless controlled Viaduct in terms of the alternative definition of "control" in cl 1.2(f)(ii) of the deed. Clause 1.2(f) reads:

> **1.2 Construction**
>
> In this Deed, unless the context requires otherwise:
>
> …
>
> (f) *Control:* a Person ("A") is "controlled" by another Person ("B") if:
>
> (i) A is a subsidiary of B under the law of incorporation of A or for the purposes of GAAP; or
>
> (ii) B is able to exercise real or effective control, directly or indirectly, over A or over a material part of A's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by A, or otherwise)

> except where A is a natural person and B's control arises solely under an enduring power of attorney granted by A in favour of B.

[48] By comparison, the definition of "control" in the Viaduct Trust Deed relied on by the Crown for charges 1–9 was based on an accounting standard, NZ IAS 24:

> *Control* is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

High Court judgment

[49] As noted, the Judge was not satisfied Mr Bublitz had control over Viaduct in the sense used in the Viaduct Trust Deed, namely the power to govern the financial and operating policies of Viaduct at any material time so as to obtain benefits from its activities. This was because Mr Wevers owned all the shares in Phoenix which in turn owned the shares in Viaduct and Messrs Wevers and McKay were its sole directors until September 2009 when Mr Wevers resigned. The Judge was not satisfied the Crown had proved its case that Mr Wevers had ceded control over Viaduct from the time it was acquired in February 2009 pursuant to "an abiding secret arrangement". The transfer by Mr Wevers of a 51 per cent shareholding in Phoenix in September 2009 gave rise to a presumption that Mr McKay controlled Viaduct in terms of the accounting standards and there was no evidence that Mr Bublitz assumed control at that point.[36] The Judge summarised the position in these terms:

> [212] I conclude, therefore, that it is reasonably possible that, immediately after the acquisition of Viaduct, Mr Bublitz did not have control of the finance company by virtue of an abiding, secret arrangement with Mr Wevers that he would do so. It is reasonably possible that he was content at that stage to use his considerable influence over Viaduct as its principal funder and his ability to engage in financial transactions with Viaduct which had the potential for it to obtain revenue from [the] vending in [of] Hunter assets and ultimately to secure the repayment of those loans for further lending.
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> [213] As defence counsel were at some pains to point out, it is by no means clear that at the time [Viaduct] was acquired it was doomed to fail. While there is no doubt that a number of the Hunter projects were in financial difficulty, the injection of funding through the acquisition of the finance company and the access to its investor funds created opportunities for the growth of both Hunter and the finance company's business. There was nothing inherently unlawful or improper in the plan to acquire a finance company for the purpose of providing access to its investors' funds. Moreover, [Viaduct] was acquired as a going concern with existing investors

[36] Verdicts judgment, above n 1, at [220].

> and the potential for a significant amount of business other than through Hunter activities. The evidence established that the transactions involving Hunter assets and entities did not represent even a majority of the finance company's business.
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> …
>
> [220] The departure of Mr Wevers from Viaduct at the end of September 2009 changed the dynamic for both the governance and management of the finance company. … The 51 per cent shareholding in Phoenix gave rise to a presumption that Mr McKay controlled the holding company and Viaduct, at least in terms of the accounting standards. It follows that, for the Crown to prove that Mr Bublitz was in control of Viaduct in terms of the accounting standards after the transfer of a controlling interest to Mr McKay, it would have to prove that there was an agreement ceding such control to him. There is no evidence that that was the case and the Crown did not seek to argue that there was evidence from which I could reach the conclusion, beyond reasonable doubt, that Mr Bublitz assumed control at that point. …

[50] However, for the purposes of the Mutual Crown guarantee, the Judge considered it was not necessary for the Crown to show that Mr Bublitz had the ability to control Viaduct through a contract, arrangement, shareholding or other interest.[37] The Judge recorded that counsel had not addressed him on the meaning of "control" under cl 1.2(f)(ii) of the Mutual Crown guarantee.[38] He considered the question was simply whether Mr Bublitz "actually exercised control" at the relevant times.[39] In concluding Mr Bublitz did so, the Judge said:[40]

> Nevertheless, I find that, notwithstanding the absence of an agreement, any presumption that Mr McKay controlled Viaduct by reason of his 51 per cent shareholding in Phoenix is displaced by significant evidence satisfying me beyond doubt that Mr Bublitz had either directly, or at least, indirectly real or effective control of Viaduct throughout the period of the alleged offending.

Submissions

[51] The appellants do not contest the Judge's conclusion that Mr Bublitz had real or effective control of Viaduct for the purposes of the Mutual Crown guarantee at the time of the transactions giving rise to charges 10–12. Nor is there any appeal against the Judge's finding that Mr Bublitz controlled Hilltop for the purposes of charge 13. We have not been asked to reconsider these issues. The sole issue for us

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37 At [229].
38 At [225].
39 At [225].
40 At [229].

on this ground of appeal is an argument that does not appear to have been raised before Toogood J, namely that the definition of "control" is insufficiently certain to amount to a requirement under s 220 of the Crimes Act.

[52] Ms Reed submits the definition of "control" in the Mutual Crown guarantee is problematically vague, being essentially whether there was control in any broad sense. She notes that the Judge was not satisfied Mr Bublitz had control of Viaduct in terms of the alternative definition relied on by the Crown under the New Zealand accounting standards. Ms Reed argues the meaning of "control" is open to differences of opinion making it difficult for a party to anticipate whether their actions would render them criminally liable.

[53] Mr Corlett QC for Mr Blackwood makes the same submission. He argues that the components of the test — "real or effective control, directly or indirectly", howsoever arising, exercised over all, or a "material part", of the business — indicate complexity and uncertainty and accordingly lack the necessary specificity to amount to a legal requirement for the purposes of s 220. He contends a defendant would have difficulty determining whether control had been informally ceded so that it was being "indirectly" exercised. To illustrate this, Mr Corlett points out that the Judge was required to make a qualitative assessment based on an evaluation of circumstances that occurred over more than a year.

[54] Mr Bradford for Mr McKay adopted the submissions made by Ms Reed and Mr Corlett on this issue.

Analysis

[55] The circumstances giving rise to a requirement for the purposes of s 220 were considered by this Court in *Nisbet v R*.[41] This Court concluded that a requirement will be established if there is a contractual obligation to deal with property in a particular way.[42] However, as Lang J explained in *R v Whale*, to come within the scope of s 220 a person must be able to identify readily the nature and scope of the obligation

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41 *Nisbet v R* [2011] NZCA 285, [2011] 3 NZLR 4.
42 At [33].

the breach of which would amount to a criminal offence.[43] So, for example, a contractual requirement to carry on business in a "prudent and businesslike manner" would not suffice.

[56] In *R v Sullivan*, Heath J considered whether a comparable provision in a Crown guarantee given in respect of South Canterbury Finance Ltd was sufficient to amount to a requirement under s 220.[44] The Judge was satisfied it did.[45] We agree.

[57] Unlike a "prudent and businesslike manner" covenant, the concept of "control" has an absolute character. It permits only one correct answer; Mr Bublitz either had control as defined or he did not. In our view, the concept of control in the Mutual Crown guarantee is sufficiently hard-edged to qualify as a requirement for the purposes of s 220. Indeed, it might be thought odd if the concept of "control" was considered to be too uncertain to qualify as a requirement for the purposes of s 220 given that very word is used in the section — "This section applies to any person who … has control over, any property …". The appellants' submissions on this point may have greater significance on the issue of whether it was proved they acted with the necessary intent, knowing the restrictions applied to the transactions because of the extended definition of control and proceeding with them knowing they breached those restrictions.

Did the Crown need to prove that the transactions were not conducted on arm's length terms?

[58] Clause 6.2(b) of the Mutual Crown guarantee prohibited Mutual from entering into any transaction with a related party having a value exceeding one per cent of Mutual's Total Tangible Assets without the prior written consent of the Crown unless:

> (i) that transaction is on arm's length terms; and
>
> (ii) an independent expert approved by the Crown in writing first certifies to the Crown in writing that the transaction is, in the opinion of that expert, on arm's length terms.

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43 *R v Whale* [2013] NZHC 731 at [489].
44 *R v Sullivan* [2014] NZHC 2501.
45 At [482].

[59] The Crown relied solely on the failure to comply with condition (ii). It is common ground that this condition was not complied with prior to the entry of the relevant transactions. Nevertheless, Ms Reed submits that a breach of the provision should not attract liability where the underlying transaction was conducted on arm's length terms. We disagree. The appellants were not entitled to disregard the requirement for independent certification. Both requirements were important and had to be met. The Crown did not have to prove that the impugned transactions were not conducted on arm's length terms. Proof of a failure to comply with either of these cumulative requirements was sufficient to establish a breach of the related party restrictions in the Mutual Crown guarantee.

Did the Judge make the requisite finding that Mr Bublitz entered into the transactions knowing they were in breach of the related party restrictions in the Mutual Crown guarantee?

[60] Ms Reed accepts the Judge correctly noted that on charges 10–13 the Crown had to prove beyond reasonable doubt that Mr Bublitz:[46]

(a) knew of the obligation; and

(b) dealt with the funds in a manner he knew and intended was in breach of the obligation.

[61] However, Ms Reed submits the Judge did not make the requisite findings of intent in relation to Mr Bublitz. She submits the Judge found only that Mr Bublitz deliberately entered into the transactions, which is not enough. She relies on the following passage in the judgment to support this submission:[47]

> It could not reasonably be suggested that Mr Bublitz did not know about the transactions which are said to have been undertaken in breach of the related party provisions in Mutual's Crown guarantee: he was in control of the entities involved; he either directed or was informed and approved of each transaction, either expressly or by silent acquiescence. As I have said, nothing was done contrary to Mr Bublitz's intentions.

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46 Verdicts judgment, above n 1, at [110].
47 At [292].

[62] Ms Reed submits this finding simply indicates that Mr Bublitz was aware of the transactions and approved them, not that he was aware they were in breach of the related party lending requirements in the Mutual Crown guarantee.

[63] Ms Reed's submission cannot be sustained given the Judge's further finding:[48]

> I am satisfied, however, that the only reasonable inference from the way in which the defendants operated after the acquisition of Mutual is that each of them was fully aware that what was done was done contrary to the obligations imposed by the Crown guarantee in the interests of Mutual's investors.

[64] Although this finding appears in a passage of the judgment dealing with submissions advanced on behalf of Mr McKay and Mr Blackwood, it is clear from reading the entirety of this section of the judgment that this finding was intended to apply equally to all three appellants. We reject the suggestion that the Judge overlooked making any finding on this essential element of these charges in respect of Mr Bublitz. The Judge clearly identified this issue in the question trail he prepared and worked from. We are satisfied his reference to "the defendants" in the paragraph quoted above was intended to include Mr Bublitz.

Did the Judge give adequate reasons for finding that Mr Blackwood and Mr McKay acted with the necessary intent?

The Judge's reasons

[65] The Judge's question trail addressed the issue of whether each of the appellants participated in the transactions knowing that they were in breach of the related party lending restrictions in the Mutual Crown guarantee. The example set out in the Verdicts judgment is for charge 12 and reads as follows:[49]

> 6. At the time of the purchase, Mr Bublitz knew that:
>
> a. Mutual's investor funds were required to be dealt with in accordance with restrictions on related party transactions contained in the Crown guarantee; and
>
> b. the purchase breached those restrictions.
>
> 7. At the time of the purchase, Mr McKay and Mr Blackwood (as the case may be):
>
> …

[48] At [298].
[49] At [131].

c. knew:

i. Mr Bublitz had control over Mutual's investor funds; and

ii. Mutual's investor funds were required to be dealt with

in accordance with restrictions on related party transactions contained in the Crown guarantee; and

iii. Mr Bublitz intentionally dealt with those funds by procuring Mutual to purchase the loan from Viaduct; and

iv. the purchase breached those restrictions?

[66] Thus, these elements of charges 10–13, covering all appellants, were to be determined by the answers to 10 questions for each charge (except for charge 13 which Mr McKay did not face). This gave a total of 36 questions. The Judge answered these questions collectively in just 10 paragraphs of his 315-paragraph judgment.[50] Only a few of these paragraphs directly addressed the appellants' knowledge of the related party restrictions in the Mutual Crown guarantee. We set those out at [69] and [70] below with the relevant conclusions shown in italics.

[67] The Judge commenced his analysis by referring to the purchase of Viaduct and the way it was subsequently managed by the appellants, reasoning that this provided "a relevant backdrop".[51] The Judge noted that Mr Bublitz involved Mr McKay and Mr Blackwood in Viaduct's proposed purchase of Mutual and sought their input.[52] The Judge also noted that Mr Blackwood conducted due diligence of Mutual on behalf of Viaduct.[53] However, the Judge makes no mention of the Mutual Crown guarantee or its provisions restricting related party lending in these background paragraphs.

[68] The Judge's conclusion that Mr Bublitz knew the transactions breached the related party restrictions in the Mutual Crown guarantee was primarily based on his correspondence with the Treasury prior to Hunter's purchase of Mutual. The Judge refers to a letter dated 9 November 2009 signed by Mr Bublitz on behalf of Hunter Capital Group Ltd and by Lindsay Kincaid, a director of Mutual, assuring the Treasury that in the initial period following purchase: Hunter did not intend to sell any assets to

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50 At [282]–[291].
51 At [282].
52 At [283].
53 At [284].

Mutual; Mutual's operations would remain largely intact with Mr Kincaid remaining as an independent director; and Hunter did not intend to take full control of Mutual until 31 October 2010, following the expiry of the Crown guarantee. Although there was no suggestion of any dishonesty on the part of Mr Kincaid, the Judge found that Mr Bublitz's assurances were untrue and deliberately misleading given how quickly he proceeded to take control of Mutual and enter into such transactions.[54] The first of these transactions was entered into on 29 January 2010, less than two months after settlement of the purchase.

[69] The Judge's conclusion that Mr Bublitz understood the related party limitations in the Mutual Crown guarantee appears in the following paragraph where he summarises the exchange of correspondence with the Treasury that followed the 9 November 2009 letter:

> [288] The Treasury declined to indicate any approval of the transaction [the purchase of Mutual by Hunter] but did say that it would appreciate clarification on whether any of the current assets of Viaduct would be sold to Mutual. Mr Bublitz responded that Mutual "currently" did not intend to purchase any assets from Viaduct but he said that, if in the future Mutual did consider purchasing assets from Viaduct, an independent expert would be employed to assess the merits of any such transaction and to ensure it was on arms' length terms. *That assurance reflected Mr Bublitz's knowledge and understanding of the related party limitations in the Mutual Crown guarantee*.
>
> (Emphasis added).

[70] The Judge found that Mr McKay and Mr Blackwood knew of and acquiesced in the false statements in the letter to the Treasury on 9 November 2009.[55] The Judge considered that Mr Blackwood and Mr McKay were "deeply involved in the acquisition process" for Mutual.[56] The Judge summarised his reasons for concluding that Mr McKay and Mr Blackwood also understood the related party restrictions in the Mutual Crown guarantee as follows:

> [289] Both Mr Blackwood and Mr McKay were deeply involved in the acquisition process and they became discretionary beneficiaries of the Mutual Trust which was established by Mr Bublitz. …
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> …

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54 At [287].
55 At [287].
56 At [284] and [289].

> [291] Bearing in mind the close working relationships, the roles of Mr McKay and Mr Blackwood in all of the steps taken to acquire the finance company, and the extent to which each of them was involved in the operation of both Mutual and Viaduct after Mutual's acquisition, *I am wholly satisfied that Mr McKay and Mr Blackwood were fully aware of the nature of the related party provisions in the Crown guarantee*.
>
> (Emphasis added).

Submissions

[71] The appellants submit the Judge's reasons for making these findings were inadequate. Mr Corlett, who took the lead on this part of the argument, submits that the Judge failed to assess Mr Blackwood's position in respect of each charge individually and was wrong to adopt a global approach for all appellants on all charges covering the transactions in 2010 based on a pattern of conduct from January 2009 onwards. Mr Corlett makes the following five submissions:

(a) The Judge stated he was "wholly satisfied that Mr McKay and Mr Blackwood were fully aware of the nature of the related party provisions in the Crown guarantee" but he did not identify the documents or recite the facts he relied on to draw this inference.[57] Nor did the Judge address the defence case for Mr Blackwood that it was reasonably possible he did not turn his mind to the related party definition in the guarantee, referred to in the charge as the "replacement Crown guarantee".

(b) There is no analysis in the judgment as to how and why Mr Blackwood knew that each transaction exceeded one per cent of Mutual's tangible assets at the relevant time or was not conducted on arm's length terms. Mr Blackwood's knowledge and intention to assist a breach of the restrictions in the Mutual Crown guarantee is not detailed anywhere in the judgment, let alone on a charge by charge basis.

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[57] At [291].

(c) There is no analysis of how Mr Blackwood is said to have known that Mr Bublitz was in control of Hilltop at the time of the loan transactions giving rise to charge 13.

(d) The Judge made extensive reference to circumstances that occurred before Mr Blackwood began work as a consultant in March 2009 and before he became a director of Viaduct on 29 September 2009 but did not detail the evidence relied on to find that Mr Blackwood acquired knowledge of those prior circumstances.[58]

(e) The Judge recorded his ruling that "a determination of which document is admissible against whom and for what purpose was best made on a document by document basis in the context of reaching my findings on the facts".[59] Despite this, there is no explanation for admitting contested documents including Mr Bublitz's 9 November 2009 letter to the Treasury. Although there was no evidence Mr Blackwood ever saw this letter, the Judge relied on it in making his findings against him.[60]

[72] Mr Bradford makes a similar submission on behalf of Mr McKay. He submits that contrary to the Judge's comment about "close working relationships", there was considerable evidence showing that prior to Mr Wevers' departure from Viaduct in September 2009, Mr McKay took no part in key decision-making and was excluded from regular management meetings and important correspondence between Mr Wevers and Mr Bublitz. Mr Bradford echoes Mr Corlett's submission that there was no evidence Mr McKay was aware of the terms of the Mutual Crown guarantee, particularly the extended definition of control in cl 1.2(f)(ii). Mr McKay was not a director or officer of Mutual and was not a signatory to the guarantee. Mr Bradford submits that the correct interpretation of the definition of control is difficult and open to legitimate debate even among experts.

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58 At [295].
59 At [75].
60 At [287].

[73] Mr Johnstone submits the Crown did not need to prove that the appellants understood the legal interpretation of each provision in the Mutual Crown guarantee; it only had to prove the appellants believed the transactions were impermissible. He argues that if the Crown proved the appellants believed the transactions were impermissible, this could only have been because they breached the related party restrictions in the Mutual Crown guarantee.

[74] Mr Johnstone defends the Judge's approach of assessing the appellants' knowledge globally. There was never any suggestion that the appellants' knowledge and involvement changed during the period covered by the charges, 25 January 2010 to 4 June 2010. In response to Mr Corlett's submission that the Judge made no finding that Mr Blackwood intended to assist in the breach of the requirements under the Mutual Crown guarantee, Mr Johnstone says "such a finding was obvious and did not need to be made — the Court did not need to deal with every factual argument". He relies on this Court's observation in *Tallentire v R* that "[w]here it is shown that accused persons knew […] they were breaching the relevant obligation when they acted, an inference of intentional breach will be irresistible".[61]

Analysis

[75] The Supreme Court recently considered in *Sena v Police* the scope and extent of reasons required in a judge-alone trial of a criminal case.[62] The Supreme Court confirmed the reasons required were as described by this Court in *R v Connell* and *R v Eide*.[63] The judgment must contain an adequate survey of the facts, the critical issues must be identified and an explanation given of how and why those issues have been resolved.

[76] The Verdicts judgment is lengthy by any measure, comprising 315 paragraphs. There can be no criticism that the Judge did not adequately survey the facts or explain the scheme of the alleged dishonesty. Nor can there be any criticism that the Judge failed to identify the elements of the charges. With the assistance of counsel,

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61 *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548 at [63].
62 *Sena v Police* [2019] NZSC 55.
63 *R v Connell* [1985] 2 NZLR 233 (CA) at 237–238; and *R v Eide* [2005] 2 NZLR 504 (CA) at [20]–[21].

he prepared a detailed question trail identifying the factual questions he had to answer to reach his verdicts on each charge. The Judge addressed the substance of the appellants' case on these questions in a logical order in clearly signposted sections of his judgment. The Judge made clear findings on the critical issues and explained his reasons for reaching those conclusions. The judgment was fully reasoned in that sense.

[77] We accept that the reasons are spare on the critical issue of the appellants' knowledge. We address below whether the reasons were sufficient in the context of considering the appellants' overall contention that the Judge erred in his assessment of the evidence and in concluding it was sufficient to justify the convictions.

Was the evidence sufficient to prove the appellants acted with the necessary knowledge and intent?

Crown submissions

[78] Mr Johnstone referred in his written submissions to 11 "actions" he said support the Judge's findings that the appellants were aware of the requirements set out in the Mutual Crown guarantee and entered into the impugned transactions knowing that they were in breach of those requirements. Of these 11, only four were referred to in the Verdicts judgment. We start with them.

(i) Mr Bublitz controlled Viaduct

[79] Mr Johnstone first refers to a paragraph in the section of the Verdicts judgment where the Judge considers whether Mr Bublitz had control of Viaduct for the purposes of the Viaduct Trust Deed. The Judge observed that Mr Bublitz used language such as "fronts", "warehousing" and transferring assets "off balance sheet". The Judge considered that this showed "Mr Bublitz was keen to avoid full transparency in the revised arrangements for the shareholdings and directorships in the Hunter Group assets". The Judge said that "[w]hile those arrangements were intended to distance Mr Bublitz from control of the Hunter entities rather than Viaduct, they demonstrate

Mr Bublitz's awareness of the implications of the related party provisions for Viaduct's dealings with them".[64]

[80] This evidence related to the period leading to the purchase of Viaduct in February 2009, long before the purchase of Mutual was in prospect. There is no doubt Mr Bublitz and Mr McKay were acutely aware of the related party restrictions in the Viaduct Trust Deed and devoted considerable attention to this issue in the period leading to the purchase of Viaduct. Mr McKay compared the related party lending restrictions in the trust deeds of four potential target finance companies including Viaduct. He prepared a schedule summarising his findings and sent this to Mr Bublitz and Mr Wevers. Mr McKay also prepared a five-page memorandum dated 12 December 2008 dealing with related party issues and provided this to Mr Bublitz and Mr Wevers for their consideration. However, this evidence does not take the Crown very far because the Judge was not satisfied Mr Bublitz controlled Viaduct for the purposes of Viaduct's Trust Deed at any time. This accorded with Mr McKay's assessment and the professional advice they received at the time of the purchase of Viaduct.

[81] Beyond demonstrating awareness of related party lending issues generally, which was what the Judge drew from this, these steps taken by Mr Bublitz and Mr McKay in late 2008 and early 2009 do not assist the Crown to prove that any of the appellants was aware of the particular restrictions in the Mutual Crown guarantee (the replacement guarantee dated 8 December 2009) or that they participated in the impugned transactions in 2010 knowing these breached those restrictions.

(ii) Mr Bublitz controlled Mutual

[82] The second reference is to a paragraph in the part of the judgment dealing with whether Mr Bublitz had control of Mutual, about which there is no dispute. The Judge refers to "the inter-connectedness of the finance companies and the entities in the Hunter Group Mr McKay sought to save". The Judge makes particular mention of an email from Mr McKay to Mr Bublitz and Mr Chevin on 24 November 2009

[64] Verdicts judgment, above n 1, at [233].

lamenting on how little interest there was in Viaduct's prospectus and "wondering whether it is not time to put a bullet to all of this".[65]

[83] It is clear that at this time Mr Bublitz and Mr McKay were working hard to keep Mr Bublitz's various business interests afloat. By 24 November 2009 it was obvious Viaduct would not be able to provide significant further lending to Hunter. This is what led to the purchase of Mutual. The email says nothing about the Mutual Crown guarantee or any restrictions on related party lending in it. Further, Mr Blackwood is not referred to in the email, he was not sent a copy of it and there is no evidence he saw it.

(iii) Involvement in purchase of Mutual

[84] The third reference is to two paragraphs in the section of the judgment headed "The defendant's knowledge and intent".[66] Here the Judge discusses the proposed purchase of Mutual and the involvement of Mr Blackwood and Mr McKay in the process. The Judge mentions that Mr Blackwood and David Macmillan, who was senior executive credit, conducted due diligence on behalf of Viaduct, which was the intended purchaser at that stage.

[85] Mr Kincaid gave evidence about the due diligence process which appears to have taken place on 9 November 2009. Mr Kincaid said that in preparing for the due diligence, he and his staff assembled the key loan files and loan histories. He expected due diligence would take two to three days to complete. However, to his surprise, Mr Blackwood and Mr Macmillan spent only two and a half hours on the entire process. Mr Kincaid described their review as "surprisingly cursory" and he said they "did a really bad job of it". Significantly, as we discuss further below, there was no evidence Mr Blackwood reviewed Mutual's then operative Crown guarantee which was contained in a deed dated 13 November 2008 and a supplemental deed dated 24 November 2008. As noted, the Mutual Crown guarantee the subject of the charges was not executed until 8 December 2009, one month after Mr Blackwood's due diligence.

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65 At [255].
66 At [283]–[284].

(iv) Letter to the Treasury dated 9 November 2009

[86] The Judge refers in the same paragraph to the joint letter to the Treasury dated 9 November 2009 signed by Mr Bublitz as a director of Hunter Capital Group Ltd and Mr Kincaid, as a director of Mutual. The initial draft of this letter was prepared by Mr McKay and sent to Mr Bublitz on 5 November 2009. Its purpose was to advise the Treasury that Mr Bublitz's interests (Hunter Capital Group Ltd) had signed an agreement to acquire Mutual and to provide assurance that the Crown's exposure under its guarantee would not increase as a result. This letter supports an inference that Mr Bublitz and Mr McKay were aware of the related party restrictions in the then current Crown guarantee because the letter refers to them:

> Although [Viaduct] is not a related party of [Mutual], any transactions contemplated between [Mutual] and [Viaduct] will be treated as if they are related party transactions for the purposes of the Crown Guarantee.

[87] However, this letter does not assist the Crown's case against Mr Blackwood for two principal reasons. First, as the Judge noted, the letter was drafted by Mr McKay. Although the Judge found that Mr Bublitz's statements to Treasury in this letter "were known and acquiesced to" by Mr Blackwood, he does not explain the basis for this conclusion.[67] Mr Johnstone did not contradict Mr Corlett's contention that there was no evidence Mr Blackwood saw this letter. Secondly, even if Mr Blackwood had seen it, the letter suggests Messrs Bublitz and McKay considered Mutual and Viaduct were not related parties, a view the Judge shared at least in terms of the definition of "control" for the purposes of the Viaduct Trust Deed and in terms GAAP, the first part of the definition of control in the Mutual Crown guarantee. The assurance in the letter is premised on the related party restrictions in the Mutual Crown guarantee not applying to transactions with Viaduct and hence the offer of an undertaking, independent of the guarantee, as to how any such transactions would be dealt with. The charges allege breaches of the related party restrictions in the Mutual Crown guarantee, not a breach of this separate undertaking the whole basis of which was that the relevant restriction in the guarantee would not apply to such transactions.

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[67] At [287].

[88] We now turn to the other seven actions Mr Johnstone relies on to support the Judge's finding of knowledge and intent against the appellants on each charge. We deal with these in chronological order.

(v) Viaduct credit submissions prepared in August 2009

[89] Mr Johnstone refers to three credit submissions prepared in August 2009 for Viaduct transactions. We are unable to see the relevance of these documents to the present issue. The appellants were acquitted on all charges arising out of Viaduct transactions in 2009, all of which pre-dated the purchase of Mutual in December 2009.

(vi) Finance company with Crown guarantee targeted

[90] Mr Johnstone next refers to the fact that a finance company that had the benefit of a Crown guarantee was targeted. He also drew attention to evidence showing the appellants discussed in November 2009 Treasury's likely concerns about the Crown's exposure under the guarantee if Mr Bublitz was to purchase Mutual. This pre-dates the Mutual Crown guarantee. It does not assist the Crown in proving the appellants knew of the particular restrictions in the Mutual Crown guarantee or that they participated in the transactions knowing they were in breach of those restrictions.

(vii) Credit submission for Homebush loan dated 5 February 2010

[91] The next document relied on is a credit submission to Mutual's board jointly signed by Mr Blackwood in his capacity as a consultant and Mr Macmillan as senior executive credit. This document is dated 5 February 2010 and concerns the proposed purchase from Viaduct of part of the Homebush loan giving rise to charge 10. Under a heading "Treasury Matters" the submission records that "[Mutual] has undertaken to Treasury that it will procure an independent report on any transactions with [Viaduct]". This is consistent with the 9 November 2009 letter that the related party restrictions in the Mutual Crown guarantee would not apply to transactions with Viaduct but would be subject to an independent undertaking. The credit submission indicates Mr Blackwood knew of the undertaking to the Treasury, but it does not show he knew the transaction would be caught by the related party restrictions in the Mutual

Crown guarantee. On the contrary, the credit submission is consistent with the reasonable possibility Mr Blackwood considered the restrictions in the Mutual Crown guarantee did not apply to this transaction.

(viii) Ms Groom's concern about inter-company transactions

[92] Next, Mr Johnstone drew our attention to the evidence of Sandra Groom who was employed with Viaduct as a finance manager in January 2010. Ms Groom said she was told when she first started working there that expert advice had established Viaduct and Mutual were not related parties. However, she said she became concerned in March and April 2010 about inter-company transactions between Viaduct and Mutual. This evidence does not advance the Crown's case on this issue because Ms Groom said she did not raise her concerns with anyone.

(ix) Email from Mr McKay on 29 March 2010

[93] The Crown also relies on an email Mr McKay sent to Messrs Bublitz, Blackwood and Chevin on 29 March 2010 with the subject heading "Why can't we get anything done?". Mr McKay commences by saying Mr Bublitz had asked him "why it is so difficult to get anything like the IM's and capital raisings done". Mr McKay offers several observations in response. Mr Johnstone relies particularly on the following two passages:

> We are spending a huge amount of time every week fighting fires – be it Kiwibank, IRD, Hilltop creditors, keeping [Viaduct] afloat… All these issues are major drains in time that is not being dedicated to 'operating the business' – it feels like a full time job just to keep on top of the cash flow and cash management issues around the group because cash is so tight. We are barely running the businesses that we have because so much time is devoted to stopping it all from falling over.
>
> …
>
> Apart from digging [Mr Bublitz] out of the shit just what are we trying to achieve?

[94] This email indicates the companies were then operating as a single group for the ultimate benefit of Mr Bublitz. It may have some relevance to whether Mr Bublitz was in control of all relevant entities — Mutual, Viaduct and Hunter. However, it does not assist in determining whether the appellants were aware of the relevant restrictions

in the Mutual Crown guarantee and were engaging in transactions they knew were in breach of them. This is no doubt why the Judge did not make any reference to this document in his reasons for finding that the knowledge elements of the charges were proved beyond reasonable doubt.

(x) Meeting with KiwiBank on 1 April 2010

[95] Mr Johnstone also places reliance on a meeting Messrs Bublitz and Blackwood attended with various KiwiBank personnel on 1 April 2010. Mr Bublitz stated at this meeting that the withdrawal of the Crown's guarantee had caused significant damage to Viaduct's brand and he intended to trade Viaduct for 12–18 months before potentially merging it with Mutual. This indicates Mr Bublitz regarded himself as having the ability to control both companies. The evidence also assists the Crown to prove that Mr Blackwood was aware of this. However, it does not help prove that the appellants knew of the relevant restrictions in the Mutual Crown guarantee or that the transactions underpinning charges 10–13 were caught by those restrictions because of the extended definition of "control".

(xi) Credit submissions relating to Hilltop

[96] Finally, Mr Johnstone places reliance on credit submissions prepared for Hilltop relating to Mutual's purchases of parts of a working capital facility Viaduct had made available to it. These were the linked transactions underpinning charge 12.

[97] The first of these credit submissions is dated 6 April 2010 and concerns the proposed purchase by Mutual from Viaduct of part ($230,000) of a working capital facility provided to Hilltop of $1.5 million. The submission was prepared in the name of Mr Blackwood but is not signed by him. Jon Pearse, a forensic manager at Deloitte, gave evidence at the first trial (which was received by consent at the second trial) that this document was created at 8.34 am on 16 April 2010 and last modified one hour later at 9.34 am. The author is shown as "Bridget". Mr Weir confirmed in cross-examination at the second trial there were no documents indicating that Mr Blackwood prepared this credit submission or that he signed it. Mr Weir agreed that Mr Chevin appears to have prepared the document.

[98] The second credit submission is dated 27 April 2010 and concerns Hilltop's request for a further advance from Mutual of $190,000. This submission also carries Mr Blackwood's name but there is no evidence he prepared it or signed it. Mr Weir confirmed in cross-examination that the document was prepared by Sophie Gill.

[99] These credit submissions do not assist the Crown to show the appellants knew the transactions were between related parties as defined by the Mutual Crown guarantee.

[100] At the hearing of the appeal, Mr Johnstone also placed reliance on Viaduct's prospectus dated 9 October 2009. This was signed by Mr McKay and Mr Blackwood as the directors of Viaduct. Mr Johnstone draws attention to the directors' response to the reasons given by the Crown for withdrawing its guarantee. Mr Johnstone claims the directors "failed to mention the nature of Mr Bublitz's role in Viaduct".

[101] We do not consider that this evidence materially advances the Crown's position on this aspect of the case. First, as Mr Johnstone acknowledges, it concerns the Viaduct Crown guarantee and pre-dates the purchase of Mutual. The appellants were never charged with breaching the Viaduct Crown guarantee and the Judge was not persuaded Mr Bublitz controlled Viaduct for the purposes of the Viaduct Trust Deed. Secondly, each of the Crown's concerns leading to the withdrawal of the guarantee is set out in italics and sequentially answered over the course of seven pages of the prospectus. These included the Crown's concerns about the transactions between Viaduct and Hunter and its view that "the transactions surrounding the purchase of Viaduct appear to have been designed primarily to advance the interests of Mr Bublitz". It is not apparent to us that the directors' responses to these concerns as set out in the prospectus were not genuinely maintained by them at that time. Their responses are consistent with the Judge's conclusion the appellants may have believed Mr McKay controlled Viaduct at that time, not Mr Bublitz. Thirdly, Mr Bublitz's engagement with Viaduct under a management services contract at an annual fee of $240,000 plus GST was disclosed. If anything, this evidence tends to support the appellants' contention (and the Judge's conclusion) that Hunter and Viaduct were *not* related parties under the terms of the Viaduct Trust Deed of the Viaduct Crown guarantee. This was the very reason for the Treasury's concern

about the capital notes issued by Viaduct to Hunter, which was recorded in the prospectus as follows:

> The capital notes have the added benefit that *neither Mr Bublitz nor interests associated with him are considered a related party under the terms of the Viaduct Trust Deed and the Crown's Deed of Guarantee*
>
> (Emphasis added).

Mr Bublitz

[102] We consider the Judge was correct to conclude that Mr Bublitz knew of the related party restrictions in the Mutual Crown guarantee and that the transactions underpinning charges 10–13 did not comply with those restrictions. There is ample evidence to support that conclusion. The real issue is whether the Crown proved to the required standard that Mr Bublitz knew Viaduct (charges 10–12) and Hilltop (charge 13) were related parties of Mutual and therefore subject to those restrictions because of the extended definition of control in the Mutual Crown guarantee.

[103] We are acutely aware of the significant advantages a trial judge has in hearing a fraud case of this type over many weeks. The Supreme Court summarised these in *Sena*.[68] Despite our misgivings about the adequacy of the Judge's reasoning on this issue, we have not been persuaded his conclusion was wrong. We briefly explain why.

[104] At the time of the events giving rise to this prosecution, Mr Bublitz had over 20 years' experience managing companies engaged in the property investment and finance sectors. He co-founded Strategic Finance Ltd in 1999 and was initially its chief executive officer. Mr Bublitz was an executive director of that company until 2006 by which time its loan book had grown to $400 million. Mr Bublitz had already accrued significant net worth from his various property investments through Hunter. Mr Bublitz was plainly a successful businessman and very experienced in the property and finance sectors.

[105] There can be no doubt that Mr Bublitz was keenly attuned to related party issues throughout the period of his involvement with both Viaduct and Mutual.

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[68] *Sena v Police*, above n 60, at [40].

Related party lending was a very topical issue with finance companies operating in the property development sector at that time. Mr Bublitz well knew that restrictions on related party transactions were routinely included in debt security trust deeds for finance companies and in the Crown guarantees provided to those companies in the wake of the GFC. Mr Bublitz commissioned Mr McKay to investigate related party issues at the time the purchase of a finance company was first mooted. Mr McKay examined the trust deeds for four prospective targets. He prepared a schedule summarising the relevant restrictions and ranking the respective definitions of "related party" from "weak" to "strong". Mr McKay also produced a five-page memorandum for Mr Bublitz and Mr Wevers on related party issues dated 12 December 2008 setting out and commenting on the various definitions of "related party" commonly included in these instruments and in other applicable legislation.

[106] The Crown guarantee was Mutual's key attraction. Mr Bublitz would not have acquired the company without it. It is inconceivable that Mr Bublitz would have completed the purchase without considering how the terms of the guarantee might affect his plans for the company post acquisition, just as he had done when considering the purchase of Viaduct.

[107] Mr Bublitz's letter to Treasury dated 9 November 2009 refers to the related party restrictions in the then current Mutual Crown guarantee, indicating he was familiar with those. The agreement for sale and purchase of Mutual which was prepared by Mr Bublitz's solicitors and signed by him specifically refers to this Crown guarantee dated 13 November 2008 as amended. The agreement was conditional on satisfactory completion of due diligence by Argus Capital Ltd by the initial completion date, being 11 December 2009. The due diligence items listed include the Crown guarantee and the Trust Deed. It is highly likely the Mutual Crown guarantee dated 8 December 2009 would have been provided to Mr Bublitz and his solicitors prior to them declaring the agreement unconditional and settling the purchase three days later, on 11 December 2009.

[108] We note in passing that the definition of "control" in the original guarantee dated 13 November 2008 is substantially the same as in the replacement guarantee

dated 8 December 2009. In both guarantees "control" means real or effective control, whether direct or indirect, and whether pursuant to a contract, an arrangement, an understanding or otherwise. The main difference is that "control" for the purposes of the 8 December 2009 guarantee extends to control "over a material part of [the related party's] business or affairs" whereas the earlier instrument dated 13 November 2008 refers only to control of the entity. This distinction is not material here because the Judge accepted the Crown's case that Mr Bublitz had real or effective control of Viaduct and Hilltop, not just a material part of their businesses.

[109] Mr Bublitz must have known about the replacement guarantee shortly after settlement, if not before, because, in his capacity as a director of Mutual, he signed a memorandum of amendments to Mutual's prospectus dated 23 December 2009 referring specifically to it. This memorandum, which pre-dated the transactions giving rise to charges 10–13, included the following statement:

> As at 8 December 2009 a new Crown Deed of Guarantee has been signed by Mutual Finance and the Crown and the initial Crown Guarantee is to be withdrawn. The coming into effect of the new Crown Guarantee and withdrawal of the initial Crown Guarantee is to occur concurrently on 1 January 2010.

[110] Once it is accepted, as we do, that Mr Bublitz would have paid attention to the extended definition of "control" in the Mutual Crown guarantee, he must have appreciated that Viaduct and Mutual were related parties for the purposes of the guarantee given the extent of his control over Viaduct's affairs. The Judge gave extensive reasons for finding that Mr Bublitz controlled Viaduct in terms of the Mutual Crown guarantee and there is no challenge to this finding on appeal.[69] The Judge observed there was "no evidence that any significant decision affecting Viaduct on a matter going to the governance of the company was made by Mr McKay or Mr Wevers contrary to Mr Bublitz's wishes or without his involvement".[70] The Judge went so far as to say that "nothing was done contrary to Mr Bublitz's intentions".[71] Mr Bublitz obviously knew this.

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69 Verdicts judgment, above n 1, at [229]–[266].
70 At [260].
71 At [292].

[111] There was considerable evidence to support the Judge's finding. Although the finding is not challenged, it is worth mentioning a little of the evidence that supports it. Mr Bublitz's services to Viaduct were provided pursuant to a management services agreement dated 16 February 2009. This agreement provided that Mr Bublitz was "responsible for all day-to-day activities" of Viaduct including, but not limited to, "managing an efficient and profitable business that meets its agreed targets for growth, profitability and business activity". For these services, Mr Bublitz was paid $240,000 plus GST per annum, the same as Mr Wevers received as chief executive officer. Mr Wevers and Mr Bublitz held weekly management meetings for Viaduct. The minutes of these meetings recorded Mr Wevers as "Chief Executive" and Mr Bublitz as "Managing Director". Consistent with Mr Bublitz having overall control, he wrote to Mr Wevers on 26 January 2009 saying "Well Mr CEO I need you to get your whip out tomorrow & get this deal done" before detailing the tasks required for each staff member, including Mr Wevers, to complete.

[112] While the Judge was not persuaded beyond reasonable doubt that Mr Bublitz controlled Viaduct in terms of the definition of "control" in the Viaduct Trust Deed, he was satisfied Mr Bublitz was able to exercise real and effective control in terms of the extended definition in the Mutual Crown guarantee. That Mr Bublitz was able to do so reflected the reality that Mr McKay allowed this to occur, possibly because of his conflicted position as Mr Bublitz's principal financial assistant throughout the relevant period. We are not persuaded the Judge was wrong to conclude that Mr Bublitz knowingly controlled Viaduct at this time.

[113] We turn now to the question of Mr Bublitz's control of Hilltop, proof of which was required for charge 13. The Judge had no difficulty concluding that Mr Bublitz controlled Hilltop at the relevant time.[72] Mr Bublitz does not challenge this finding on appeal.

[114] Hilltop was incorporated on 25 May 2009. From then until his resignation on 28 September 2009, Peter Mackie was its sole director and shareholder. Mr Mackie said he was surprised to learn of this suggested appointment and he was effectively

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[72] At [269]–[271].

'bulldozed' into the role by Mr Bublitz, Mr Wevers and Mr Chevin. Mr Mackie said he did not run the company and was "just a puppet".

[115] When Mr Mackie resigned in September 2009, Mr Chevin introduced Peter Hill to Mr Bublitz. Mr Hill agreed to replace Mr Mackie on the understanding his role would be short-term — "only perhaps 18 months tops". Mr Hill confirmed that Mr Bublitz made all major financial decisions for Hilltop. He said Mr Bublitz drafted the letter Mr Hill signed and sent to Mutual (for the attention of Mr Bublitz) on 9 June 2010 requesting it to exercise its power of appointment of a receiver to Hilltop. For his part, Mr McKay regarded Mr Hill as a "puppet director shareholder".

[116] We are satisfied the Judge was correct to find that Mr Bublitz controlled Hilltop at the relevant time and knew that he did so in terms of the extended definition of control in the Mutual Crown guarantee.

Mr McKay

[117] We are similarly not persuaded the Judge was wrong to conclude that Mr McKay was aware of the restrictions on related party lending in the Mutual Crown guarantee and must have known the relevant transactions breached those restrictions.

[118] Mr McKay held a Bachelor of Commerce in Economics and a post-graduate diploma in financial economics. He was a former member of the Institute of Directors and the Institute of Finance Professionals New Zealand. After qualifying, Mr McKay worked for one of the major banks before joining a share broking firm where he became involved in company valuations and investment analysis. Mr McKay worked for two other share broking firms, including a period overseas, before founding his own finance consulting company in New Zealand, Saffron Capital Ltd. His services to Hunter were provided through this company under a management services agreement dated 5 August 2005. A new management services agreement was entered into between Viaduct, Saffron and Mr McKay on 16 February 2009. This provided for Mr McKay to fulfil the role of chief financial officer for Viaduct.

[119] The evidence shows that Mr McKay carried out his work in a careful and competent manner. Ms Groom, who worked closely with Mr McKay, considered him to be "very professional", "quite particular" and "careful with documentation".

[120] Mr McKay played an important role in the acquisition of both Viaduct and Mutual and the subsequent administration of their operations. He took the lead throughout in considering related party issues under the applicable Trust Deeds and Crown guarantees for Viaduct and Mutual. This was a central focus of his. He liaised with the external advisers who provided advice on related party issues prior to the purchase of Viaduct. He sought advice from the same lawyers in late October 2009 asking whether loan sales by Viaduct to another lender would create related party issues for the purposes of the Crown guarantee. Mr McKay said this was a coincidence and was unrelated to the proposed purchase of Mutual. However, this demonstrates his ongoing attention to related party issues at the time Mutual was acquired. It is of some significance that the definition of "control" in the Crown guarantee considered in the October 2009 advice is in very similar terms to the Mutual Crown guarantee. In both guarantees, control exists where a person "is able to exercise real or effective control, directly or indirectly, over [the other party] or over a material part of the business" of the other party. The lawyers emphasised that control must be real and effective, but it may be direct or indirect. Mr McKay must have appreciated the breadth of the provision and its significance in the context of the proposed transactions between Viaduct and Mutual.

[121] Mr McKay must have known from his close working relationship with Mr Bublitz and his involvement in the day-to-day operations of all relevant entities, Viaduct, Mutual and Hunter, that Mr Bublitz was exercising effective overall control by the time of the transactions giving rise to charges 10–12. We are not persuaded the Judge was wrong to conclude Mr McKay knew these transactions were caught by the extended definition of control in the Mutual Crown guarantee. He must have been aware that the transactions breached the relevant restrictions (the value of the transaction or series or linked or related transactions exceeded one per cent of Total Tangible Assets of Mutual, the transactions were not on arm's length terms and they had not been pre-certified by an independent expert approved by the Crown in writing). Mr McKay, more than anyone, had a clear understanding of the exact

financial position of the relevant entities, Hunter, Viaduct and Mutual, throughout this period.

Mr Blackwood

[122] We see Mr Blackwood as being in a different category. Although he was appointed a director of Viaduct following Mr Wevers' resignation, he was not paid director's fees. His day-to-day role as a lending originator for Viaduct, for which he was paid only success fees, did not change. Mr Johnstone's closing submissions in the High Court comprised 130 pages. On the topic of Mr Blackwood's alleged knowledge of the relevant restrictions in the Mutual Crown guarantee, Mr Johnstone said only this:

> Mr Blackwood would have been provided a copy of the updated guarantee in the course of undertaking his due diligence of Mutual.

[123] Mr Blackwood and Mr Macmillan carried out what Mr Kincaid described as cursory due diligence of Mutual's key loan files. Although he was a Crown witness, Mr Kincaid was not asked whether the due diligence extended beyond the loan files to include the Mutual Crown guarantee. Mr McKay confirmed in his evidence that the due diligence undertaken by Mr Blackwood and Mr Macmillan involved a review of Mutual's loan files. Mr Johnstone was not able to refer us to any evidence showing that Mr Blackwood received a copy of the Mutual Crown guarantee or that he was aware of its terms from undertaking due diligence or otherwise.

[124] By addressing globally whether the appellants knew the transactions breached the related party restrictions, the lack of evidence against Mr Blackwood on these critical issues was obscured. For the reasons we have given, the "actions" relied on by Mr Johnstone to support the Judge's findings are, in our assessment, insufficient to prove beyond reasonable doubt that Mr Blackwood knew the related party restrictions in the Mutual Crown guarantee applied to the transactions because of the extended definition of "control" and that he assisted the completion of these transactions knowing they breached those restrictions.

[125] We are acutely conscious of the major advantage the trial Judge had in hearing the evidence over several weeks and we hesitate before disagreeing with the factual

findings of the experienced Judge. However, we are not persuaded by the brief reasons he gave on this aspect of the case, namely that all knowledge elements were proved to the requisite standard against Mr Blackwood. Although we set the relevant passage out at [70] above, for ease of reference, we set it out again:

> [291] Bearing in mind the close working relationships, the roles of Mr McKay and Mr Blackwood in all of the steps taken to acquire the finance company, and the extent to which each of them was involved in the operation of both Mutual and Viaduct after Mutual's acquisition, *I am wholly satisfied that Mr McKay and Mr Blackwood were fully aware of the nature of the related party provisions in the Crown guarantee*.
>
> (Emphasis added).

[126] We do not disagree with the Judge's finding that Mr Blackwood knew of Mr Bublitz's central role at Mutual and Viaduct at all material times. However, as we have attempted to demonstrate, there was a remarkable lack of evidence to show that Mr Blackwood was "fully aware of the nature of the related party provisions in the Crown guarantee". It must be kept in mind that the Judge considered the Crown had not proved Mr Bublitz controlled Viaduct for the purposes of the Viaduct Trust Deed. There was no particular change in the way Viaduct operated after Mr Bublitz purchased Mutual. We cannot exclude the reasonable possibility that Mr Blackwood was not aware of the extended definition of "control" in the Mutual Crown guarantee which led to the Judge's conclusion that Mr McKay's presumptive control, as the holder of 51 per cent of the shares in Phoenix, was displaced for the purposes of that guarantee.

Were the statements about the Crown guarantee in Mutual's prospectuses materially false?

[127] Charges 14 and 15 alleged that Mutual's prospectuses, the first dated 3 March 2010 and the second an amended prospectus dated 28 April 2010, contained false statements which were intended to induce members of the public to subscribe for securities. The statements in the prospectus referring to the Mutual Crown guarantee were said to be false because there was no disclosure of the alleged breaches founding charges 10–13 and the consequent risks of the guarantee being withdrawn at short notice.

[128] The Judge found that the failure to disclose the breaches of the Mutual Crown guarantee was misleading in that these would have justified the Treasury in immediately withdrawing the guarantee.[73]

[129] Ms Reed submits the statement in the prospectus was not materially misleading because the investors' funds remained secured by the Mutual Crown guarantee regardless of whether Mutual was in breach of it during the currency of the prospectus. In our view, this is plainly correct. Unless and until the guarantee was withdrawn, all investments made in response to the prospectus, both principal and interest, were unconditionally guaranteed by the Crown. In these circumstances, we cannot see how the alleged non-disclosure was in any way material. Mr Johnstone responsibly acknowledged the force of this analysis although he did not make any formal concession.

[130] It follows that the convictions against Mr Bublitz on charges 14 and 15 must be set aside.

Did the Judge make the required finding of intent?

[131] It is not strictly necessary for us to consider this second ground of appeal on charges 14 and 15. However, for completeness, we briefly address it.

[132] Ms Reed submits the Judge overlooked the need to find that in making the false statement Mr Bublitz intended to induce investors to invest. She focuses her criticism on the following paragraph of the judgment:[74]

> I have given careful consideration to the further proposition which the particulars of Charge 14 require also to be proved; namely, that Mr Bublitz knew that the failure to alert investors to the prospect that the Crown guarantee might be removed because of the breaches of the related party provisions. It occurred to me that that might be too subtle a consideration to found a criminal charge. On reflection, however, I have decided that the enthusiastic reference by the directors to the "great deal of comfort" provided to investors by the guarantee was misleading without being qualified by a reference to the fact that related party transactions had been undertaken without approval and in breach of the guarantee and that continuation of the guarantee was at risk as a result. Having regard to Mr Bublitz's experience with the withdrawal of the Viaduct guarantee and the disastrous consequences for that company as

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73 At [312].
74 At [313].

> a result, Mr Bublitz knew of the risk and was, at the very least, reckless in not drawing it to the attention of investors.

[133] While Ms Reed is correct that the Judge did not expressly find that Mr Bublitz's statement about the Crown guarantee in the prospectus was intended to induce members of the public to invest, this appears not to have been contested and such a finding was inevitable. There can be no other explanation for including reference to the Mutual Crown guarantee in the prospectuses; it was obviously intended to induce investment and would have done so. We can be confident the Judge did not overlook this element of the charge because he identified it in his question trail as one of the four questions requiring the answer "yes" before he could find Mr Bublitz guilty on these charges.

[134] The Judge found that Mr Bublitz was aware that the failure to disclose known breaches of the guarantee was misleading.[75] This finding established that the statement was a "false statement" for the purposes of s 242(2)(a) of the Crimes Act:

> **242 False statement by promoter; etc**
>
> …
>
> (2) In this section, **false statement** means any statement in respect of which the person making or publishing the statement—
> (a) knows the statement is false in a material particular; or
> (b) is reckless as to whether the statement is false in a material particular.

[135] The Judge's later reference to Mr Bublitz being reckless was likely directed to the alternative definition of a false statement under s 242(2)(b). We say that because the fourth question posed by the Judge in his question trail asked whether Mr Bublitz knew the statement was false or was reckless as to that possibility. The reference in the reasons to the issue of recklessness was unnecessary because the Judge's finding of actual knowledge that the statement was false was sufficient. That the Judge took a belts and braces approach cannot be criticised and does not assist this aspect of Mr Bublitz's appeal.

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[75] At [312].

Were Mr McKay's fair trial rights breached?

[136] This complaint is based on the procedure the Judge adopted for closing submissions. The Crown presented its written and oral closing submissions on 24 and 25 October 2018. The case was then adjourned until 15 November 2018 for defence closings.

[137] Counsel for Mr Bublitz presented his closing submissions on 15 November 2018. The following day, the Judge issued a minute advising that he had prepared a draft question trail but it required revision. The Judge proposed to circulate the question trail once modified and discuss it with counsel on 19 November 2018. To allow for this, the Judge deferred the commencement of closing addresses for Mr McKay and Mr Blackwood until 21 November 2018.

[138] As it transpired, the question trail was not circulated until 20 November 2018. In his accompanying minute the Judge observed:[76]

> [4] I have found the wording of some of the charges and the particulars ambiguous and, in some cases, arguably duplicitous. Where several transactions forming the basis of one charge are alleged to have occurred over a period, it is necessary to consider whether separate charges ought to have been alleged, given that it is not permissible to allege a representative charge where the dates or specific instance of the offending can be ascertained.
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> [5] I have endeavoured to identify the difficulties with the charges by posing the questions in each charge on an assumption which I accept may not reflect the charge as worded. That is because, in some instances it appears the Crown's propositions are not reflected in the wording of the relevant charge.

[139] The Judge discussed the question trail with Mr Johnstone in the presence of other counsel the following morning, 21 November 2018. During these discussions, Mr Johnstone re-stated the Crown's position on several aspects of its case to assist the Judge in finalising his question trail. Mr Johnstone also proposed minor amendments to some of the charges arising out of these discussions which concluded around 11.30 am. The Judge adjourned until midday to allow time for defence counsel to consider the matters discussed before responding. Counsel for Mr Bublitz and Mr Blackwood then addressed the Court. The Court adjourned at 12.30 pm on

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[76] *R v Bublitz* HC Auckland CRI-2014-004-2293, 20 November 2018 (Minute No 30).

the basis that Mr Bradford would deliver his closing submissions for Mr McKay the following morning.

[140] At 5.15 pm that evening, the Crown circulated its suggested changes to the question trail and the Crown charge notice. The transcript of the discussions with counsel that day was provided to counsel at 7.30 pm.

[141] The Judge allowed the amendments the following morning. Mr Bradford applied for an adjournment to allow more time for him to consider whether there was any prejudice to Mr McKay arising from the amendments before delivering his closing address. This application was declined.[77] Mr Bradford accordingly delivered his closing address for Mr McKay in writing on 22 November 2018. He did so without referring to the amended charge notice or the question trail. He explained that this was because he did not have enough time to modify his closing address.

[142] Given the history of the proceeding, Mr Bradford submits the Judge ought to have entered acquittals on 20 November 2018 if he was of the view the Crown propositions in closing were not in accordance with the wording of the charges. Mr Bradford submits that the "deprivation of time and facility" to consider and respond to the "changed landscape" caused a miscarriage of justice and the appropriate response would be to set aside the convictions.

[143] We are not persuaded by Mr Bradford's submissions. The amendments to the charges were minor and did not alter in any material way the substance of the allegations. Other defence counsel took no issue with the amendments. It is telling that even now, many months later, Mr Bradford has still not been able to identify any prejudice to Mr McKay arising from these minor amendments. We cannot see how they would have had any effect on the submissions Mr Bradford presented which explained in considerable detail the substance of Mr McKay's defence.

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[77] *R v Bublitz* HC Auckland CRI-2014-004-2293, 22 November 2018 (Minute No 31).

Conclusion on conviction appeals

[144] For the reasons given, Mr Bublitz's appeal against conviction on charges 10–13 must be dismissed but allowed on charges 14 and 15. Mr McKay's appeal against conviction on charges 10–12 must be dismissed. Mr Blackwood's appeal against conviction on charges 10–13 must be allowed.

Mr Bublitz's sentence appeal

Sentencing judgment

[145] In assessing the scale of the offending on charges 10–13, the Judge accepted the Crown's submission that it would be appropriate to take account of all transactions involving the same parties, not just those the subject of the charges:[78]

> [The Crown] submits that in all, across 16 transactions, Mutual purchased $3,923,365 in Viaduct Loans, and advanced a combined sum of $243,444.61 to Homebush and Hilltop on the basis of six separate credit submissions. It also advanced $230,000 to NKE, another Hunter entity, on 26 March 2010, a loan which Viaduct purchased from Mutual on 28 April 2010.
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> … I accept Mr Johnstone's submission that while not all of the amounts just mentioned were essential to the verdicts on charges 10 to 13, it is appropriate that they be taken into account on sentencing as being relevant facts disclosed by the evidence at trial.
>
> (Footnotes omitted).

[146] Although charges 1–9 were dismissed, the Judge considered it "unrealistic to ignore" the steps taken by the appellants from January 2009 to implement a plan of concealment of Mr Bublitz's interests from the trustee for the Viaduct debenture holders, Treasury officials and Viaduct's investors.[79] So, although the offending occurred over a relatively short period between 25 January 2010 and 4 June 2010, the Judge considered this was the almost inevitable consequence of a predetermined plan:[80]

> It follows, therefore, that I accept Mr Johnstone's proposition that between January and December 2009 your conduct involved operating "at the margins of legality" and that sailing so close to the wind meant that it was almost

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78 Sentencing judgment, above n 9, at [28]–[29].
79 At [40]–[42].
80 At [45] and [54].

> inevitable that, as the Hunter Group's prospects deteriorated, you would inevitably cross the line into criminality.
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> …
>
> Although the offences for which you have been convicted occurred only in the space of just over three months, the deceptive and misleading activity which led to your convictions covered more than a year.

[147] As to the scale of the offending, the Judge accepted the Crown's calculations of the amounts involved in the charged transactions:[81]

(a) Charges 10–12 — Mutual purchased $3.9 million in loans from Viaduct.

(b) Charge 13 — Mutual lent $208,444.61 to Hilltop.

(c) Charges 14 and 15 — investors subscribed for secured debenture stock of the order of $4.88 million in response to the prospectuses.

[148] The Judge also took into account that the Crown had paid out in excess of $9 million under the guarantee of which approximately $3.38 million remained unrecovered at the time of sentencing.[82]

[149] After considering comparable authorities, the Judge adopted a starting point of four years and six months' imprisonment for Mr Bublitz on charges 10–13.[83] The Judge applied an uplift of nine months' imprisonment to take account of the prospectus charges to give an overall starting point of five years and three months' imprisonment.[84] The Judge then allowed a discount of 30 per cent from that starting point to allow for the "significant punitive element in the way in which this criminal prosecution has been undertaken".[85] This discount equated to approximately 19 months. The Judge allowed a further discount of 10 per cent from the starting point, six months, to recognise Mr Bublitz's previous good character, remorse and his

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81 At [53].
82 At [52].
83 At [78].
84 At [78].
85 At [93].

cooperation in the efficient running of the trial.[86] This yielded an end sentence of three years and two months' imprisonment.

Was the starting point for charges 10–13 too high?

[150] We accept Ms Reed's submission that the Judge ought not to have taken account of transactions that were not the subject of charges. We also consider the Judge overstated the period of the offending by taking account of conduct from January to December 2009 which he regarded as being "at the margins of legality". As the Judge himself observed in his Verdicts judgment, there was nothing inherently unlawful or improper in Mr Bublitz's plan to acquire a finance company for the intended purposes.[87] Mr Bublitz was sentenced for theft arising out of transactions in 2010, not for activity in 2009 which was not proved to be illegal and in respect of which Mr Bublitz retains the presumption of innocence. The amount paid by the Crown in response to its guarantee also overstates the scale of the offending because this exposure was not even confined to the period of Mr Bublitz's ownership of Mutual, let alone to the thefts he was convicted of. Mr McKay calculated that total advances made to entities linked to Hunter represented 28 per cent of total advances. The Judge appears to have accepted this evidence.[88]

[151] The thefts occurred over a four-month period and involved a total of approximately $1.17 million:

(a) Charge 10 — Homebush loan purchase in two tranches — $495,000 and a further $35,000.[89]

(b) Charge 11 — Northgate loan of $235,000.[90]

(c) Charge 12 — Hilltop loan purchase of $200,000.[91]

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86 At [101].
87 Verdicts judgment, above n 1, at [213].
88 At [213].
89 Sentencing judgment, above n 9, at [24].
90 At [25].
91 At [26].

(d) Charge 13 — direct loan to Hilltop of $204,444.61.[92]

[152] Of this total, $273,000 was repaid by Homebush and $37,000 by Hilltop. The loss was therefore approximately $860,000.

[153] We do not see Mr Bublitz's offending as comparable to some of the cases the Judge relied on in setting the starting point. In *Tallentire v R*, this Court upheld a starting point of six years' imprisonment for Mr Tallentire[93] and eight and a half years' imprisonment for Mr Douglas and Mr Nicholls.[94] However, the offending in that case was described by this Court as "theft on a grand scale", involving $19.76 million in the case of Messrs Nicholls and Douglas and $12.1 million in the case of Mr Tallentire.[95] The offending, described as premeditated and sophisticated, was motivated purely by greed. Mr Nicholls and Mr Douglas benefitted considerably. Both received substantial cash distributions and Mr Nicholls acquired a valuable beach property at Omaha without paying for it. Mr Tallentire also benefitted by obtaining access to funds to acquire the finance company from Mr Nicholls and Mr Douglas along with another company based in Australia.

[154] The offending in *Ludlow v R* was also of a different order of magnitude.[96] This Court described Mr Ludlow's offending as "significant commercial fraud".[97] The amount involved in these thefts was $3.7 million causing a net loss of approximately $2.9 million. The offending was premeditated, occurred over a period of 19 months and was motivated by greed.[98] Mr Ludlow and his family gained significant benefits, including the purchase of four recreational villas in Fiji. This Court upheld a starting point of six and a half years' imprisonment adopted in the District Court for six theft charges by a person in a special relationship under s 220 of the Crimes Act.

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92 At [27].
93 *Tallentire v R*, above n 59, at [151] and [185].
94 At [149] and [185].
95 At [180].
96 *Ludlow v R* [2013] NZCA 196.
97 At [1].
98 At [7].

[155] The decision of this Court in *Hamilton v R* was also referenced.[99] This Court upheld a starting point of five years' imprisonment for 14 charges of theft under s 220 of the Crimes Act. Mr Hamilton was a solicitor who assisted the principal of a finance company to structure his affairs in order to conceal his control of related entities which he funded over a three-year period using the finance company's funds in breach of the debenture trust deed. Mr Hamilton also assisted the principal by drafting and executing loan documents which he knew were in breach of the trust deed. The finance company collapsed causing loss to investors of approximately $12.5 million.

[156] Like the Judge, we regard Mr Bublitz's culpability as being at a lower level than the offending in these cases. It is more comparable, although more serious than in the other cases the Judge referred to, *R v Cropp* and *R v Sullivan*.[100]

[157] Mr Cropp was the chief executive officer of the Dominion Finance Group of companies. His offending arose out of four related party transactions in a one-month period causing losses of approximately $9 million. Mr Cropp's offending occurred as part of an attempt to keep the business afloat. He did not gain personally. Lang J adopted a starting point of three years and four months' imprisonment for this offending.

[158] Heath J adopted a similar starting point of three years and six months' imprisonment for Mr Sullivan for his deliberate and dishonest failure to disclose related party transactions connected with South Canterbury Finance causing losses of the order of $7 million. Mr Sullivan did not gain personally. The Judge found that his offending was motivated by a misguided sense of loyalty to Mr Hubbard.

[159] Having regard to these cases, we consider that an appropriate starting point for Mr Bublitz should have been no more than four years' imprisonment. Mr Bublitz's offending was partly motivated by the prospect of personal gain. However, he did not benefit. Rather, as the Judge accepted, he lost well over $2 million of his own money attempting to "rescue the situation".[101] We differ from the Judge only to the extent he

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99 *Hamilton v R* [2015] NZCA 28.
100 *R v Cropp* [2013] NZHC 1193; and *R v Sullivan* [2014] NZHC 3201.
101 Sentencing judgment, above n 9, at [71(c)].

took account of Mr Bublitz's conduct in 2009 that was not found to be unlawful and he overstated the losses. We consider the starting point should be reduced by six months to account for this.

[160] Ms Reed also submits the starting point of four years and six months' imprisonment on charges 10–13 adopted for Mr Bublitz cannot be justified as having reasonable parity with those of his co-offenders. Mr McKay, who the Judge described as "the principal architect of the scheme",[102] was convicted of charges 10–12, for which a starting point of three years and three months' imprisonment was adopted yielding an end sentence of 12 months' home detention.[103] In Mr Blackwood's case, who was similarly convicted of charges 10–12, a starting point of two years and nine months' imprisonment was adopted leading to an end sentence of nine months' home detention.[104] Mr Chevin pleaded guilty to nine representative charges. A starting point of two years and nine months was adopted by Woolford J leading to an end sentence of nine months' home detention.[105]

[161] We consider there is some force in Ms Reed's parity complaint. The Judge described Mr McKay's culpability as being only "somewhat lower" than Mr Bublitz.[106] We agree with that assessment. Both stood to benefit. Neither did. Unlike Mr McKay who the Judge found was the principal architect of the scheme and lost nothing, Mr Bublitz lost well over $2 million of his own money. We consider the disparity — more than one third — between the starting point of four years and six months' imprisonment adopted for Mr Bublitz and three years and three months' imprisonment for Mr McKay is hard to justify.

[162] For all these reasons, we conclude the appropriate starting point for Mr Bublitz should have been no higher than four years' imprisonment.

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102 At [47].
103 At [79] and [108].
104 At [80] and [109].
105 *R v Chevin* [2017] NZHC 285 at [39].
106 Sentencing judgment, above n 9, at [47].

Uplift for other offending

[163] It follows from our conclusion on the conviction appeals relating to charges 14 and 15 that the uplift of nine months for this offending cannot now be applied.

Discount for delay

[164] We consider the discount allowed by the Judge for delay, effectively 19 months, was appropriate. However, we disagree that it should be calculated as a percentage. To illustrate the point, Mr Bublitz's starting point would have been considerably greater had he been convicted of all 15 charges. It would have been greater again if he had been convicted of all 49 charges he originally faced. If the discount for delay is calculated as a percentage, the allowance would vary considerably depending on the number of convictions. Equally, if Mr Bublitz had been convicted of only one charge, he would receive little credit for the consequences of the delay if this is calculated as a percentage of the starting point. The consequences of the delay for Mr Bublitz are the same in each of these examples. He spent nine months of his life and over $1 million of his own money in a High Court trial that had to be aborted due entirely to failings for which the Crown must take sole responsibility. He has suffered considerably in consequence of this. We can see no principled basis for calculating the allowance as a percentage of the eventual sentencing starting point. The remedy is for the breach of Mr Bublitz's right to be tried without undue delay and this has no necessary correlation to the starting point adopted at sentencing to reflect his culpability for the offending.

[165] For these reasons, we make no adjustment to the allowance afforded by the Judge of 19 months' imprisonment.

Conclusion on sentence appeal

[166] Mr Bublitz's appeal against sentence must be allowed. The adjusted starting point on charges 10–13 is four years' imprisonment. From that, 19 months must be deducted for delay and a further five months (10 per cent) for the personal mitigating factors the Judge took into account. This yields an end sentence of 24 months' imprisonment, making home detention an option. We consider such a sentence would

be the least restrictive sentence appropriate in the circumstances in terms of s 8(g) of the Sentencing Act 2002. Mr Bublitz has been a serving prisoner since 28 May 2019, approximately two and a half months. Taking that into account, the end sentence would reduce to approximately 21 and a half months' imprisonment. Taking into account the time he has served, we consider it is appropriate to substitute a sentence of 11 months' home detention.

Result

[167] Mr Bublitz's appeal against conviction is allowed in part. The convictions on charges 14 and 15 are set aside. We direct that a judgment of acquittal be entered on those charges. Mr Bublitz's appeal against conviction on charges 10–13 is dismissed.

[168] Mr Bublitz's appeal against sentence is allowed. His sentence of three years and two months' imprisonment is set aside and a sentence of 11 months' home detention is substituted on each of charges 10–13 to be served concurrently. This sentence is to commence immediately upon release. Following his release, Mr Bublitz is to travel directly to the address stated in the memorandum dated 9 July 2019 from the Department of Corrections and await the arrival of a security officer. Mr Bubltiz is to comply with the special conditions set out in that memorandum.

[169] Mr McKay's appeal against conviction is dismissed.

[170] Mr Blackwood's appeal against conviction is allowed. The convictions on charges 10–13 are set aside. We direct that a judgment of acquittal be entered on those charges.

Solicitors:
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